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Case No. 90-633

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

EUGENE RAFFIELD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent, the State of Florida ("Florida") arrested Petitioner Eugene Raffield ("Raffield") on July 16, 1986, for violating FLA.STAT. § 370.08(3) (1985). Raffield's employees or agents used his boat to catch over 80,000 pounds of red drum (redfish), with a purse seine, in federal waters of the Gulf of Mexico. Florida does not dispute that the fish were caught pursuant to a federal permit.[1]

The fish were landed in Louisiana, and transported by truck to Raffield's processing plant in Port St. Joe, Florida. At the processing plant, Raffield was arrested for violating the possession component of 370.08(3) [hereinafter "possession/landing law"] which provides:

> No person may take food fish within or without the waters of this state with a purse seine ... *or have any food fish so taken in his possession* for sale or shipment. [e.s.]

The possession/landing law has been codified in its contemporary form since 1953,[2] twenty-three years before passage of the Magnuson Fishery Management and Conservation Act (16 U.S.C. §§ 1801-82, hereinafter the "Magnuson Act"). The same federal emergency regulations that permitted catching the redfish expressly preserved state landing laws:

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1 Federal emergency rules imposing a one-million pound quota on commercial red drum harvest in the Gulf of Mexico took effect June 25, 1986. 51 Fed.Reg. 23551 (June 30, 1986). These rules provided for issuance of permits to harvest redfish until the quota was reached. *Id.* The fishery was closed on July 20, 1986. *See* 51 Fed.Reg. 26554 (July 24, 1986). Subsequent federal rulemaking has not allowed direct harvest of redfish since that time. Incidental commercial or recreational catch of red fish from Federal Gulf waters still "must comply with the landing and possession laws of the State where landed." *See* 50 CFR § 653.3(c) (Oct. 1, 1989).

2 *See* FLA.STAT. § 370.08(3) (1953).

§ 653.3 Relation to other laws.

* * * *

(d) These regulations will not be construed to supersede any State law which prohibits the landing or *possession* within the jurisdiction of that State of any red drum. [e.s.] [hereinafter the "savings clause"].

51 Fed.Reg., 23554 (June 30, 1986).

In this context, the questions presented for review are:

1.Whether FLA.STAT. § 370.08(3) (1985) was preempted despite express preservation of possession/landing laws by the savings clause in the emergency rules, and by the Magnuson Act [16 U.S.C. § 1856(a)(3)].

2.Whether Florida's enforcement of § 370.08(3) violates the Privileges and Immunities Clause of United States Constitution when there is no discrimination against citizens of other states.

3.Whether Florida's enforcement of § 370.08(3) violates equal protection in light of this court's specific holding to the contrary in *Skiriotis v. Florida.*

4.Whether Florida's enforcement of § 370.08(3) constitutes an impermissible burden on interstate commerce.

5.Whether Florida's enforcement of § 370.08(3) violates Raffield's due process rights.

LIST OF PARTIES

There is one other defendant to the state proceedings not shown in the caption: Raffield Fisheries, Inc.

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CITATIONS TO OPINIONS AND JUDGMENTS BELOW

Florida is satisfied with Raffield's citations to the opinions below.

JURISDICTIONAL STATEMENT

Raffield seeks review of the decision by the Florida Supreme Court entered July 19, 1990. The decision resolves an interlocutory matter. Therefore the jurisdictional requirement of a "final judgment or decree" under 28 U.S.C. § 1257 is not met. This case does not fit within any exceptions to that requirement.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

Florida is satisfied with Raffield's statement as to this item, except to add:

Federal Statutory Law
28 U.S.C. § 1257

Federal Regulations
51 Fed. Reg. 23551-6 (June 30, 1986)

Florida Statutes
FLA.STAT. § 370.01(12)(1985)

STATEMENT OF THE CASE

For clarity, Florida notes that Raffield has not been brought to trial. There has been no conviction.

SUMMARY OF ARGUMENT

Raffield seeks review of a decision by the Florida Supreme Court that is not a final judgment. He has not established jurisdiction in this court.

If there is jurisdiction, the questions raised by Raffield do not warrant this Court's review. The Florida Supreme Court's decision is in accord with controlling decisions by this Court and does not conflict with other State Supreme Courts on any issues of Federal law.

Florida's statute was not preempted by the Magnuson Act and the emergency red drum rules that implemented it, but was the subject of specific savings language in both. The statute does not conflict with either. The Privileges and Immunities Clause is not implicated because there is no disability forced upon non-Florida residents. The Equal Protection Clause is not violated by enforcement only in Florida based on this court's holding in *Skiriotis*. Florida's statute has at most an indirect effect on interstate commerce. Any burden is incidental to the legitimate state interest in protecting fisheries resources. Raffield's substantive due process argument was not raised below. Nevertheless, the challenged statute is reasonably related to a legitimate state objective and therefore not violative of due process. Raffield's petition for certiorari must be denied.

ARGUMENT

JURISDICTION

Raffield invokes this court's jurisdiction under 28 U.S.C. § 1257. This court, pursuant to 28 U.S.C. § 1257(3), has jurisdiction to review "final judgments or decrees" of state courts by writ of certiorari. There has been no trial, conviction or sentence; and therefore no final judgment. *Berman v. United States,* 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence."); *Flynt v. Ohio,* 451 U.S. 619 (1981) (no final judgment when no sentence has been imposed). Raffield has not established jurisdiction in this court.

Raffield admitted the facts of this case only for purposes of his motion to dismiss under FLA.R.CRIM.P. 3.190(c)(4). Given such admission, the fact that two Florida appellate courts have ruled he may be prosecuted under Florida's possession/landing law does not compel the conclusion that his trial would amount to "no more than a few formal gestures leading inexorably towards a conviction." *Mills v. Alabama,* 384 U.S. 214, 217 (1966). To convict Raffield, Florida still must prove that Raffield possessed redfish caught with a purse seine, a matter resting upon facts involving significant time and distance. It is not at all certain that Raffield's defenses to date are his only defenses, or that conviction would be an inexorable result of denying certiorari.

Raffield claims the right to possess fish in violation of a state possession/landing law that was designed to effectuate restrictions on commercial fishing gear. However, there is no federal constitutional right to fish with particular gear at a particular place or time. The absence of a fundamental constitutional right, such as freedom of speech, distinguishes this case from *Cox Broadcasting v. Cohn,* 420 U.S. 469 (1975) (reviewing state law that prohibited broad-

cast of rape victim's name, and discussing four categories in which highest state court judgment would be considered final despite remaining state court proceedings).

Unique events of this case insure that no federal constitutional issue will survive further state court proceedings. The savings clause within the long-expired[3] emergency rules was not carried forward in the permanent red drum rules.[4] Absent changes to current federal redfish rules, the factual circumstances giving rise to Raffield's claim cannot recur. Consequently this case is factually unlike *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, this Court recognized that the federal constitutional issue raised by prosecutorial withholding of exculpatory evidence would survive state proceedings. *Id.* at 217, note 1. Therefore review in absence of final judgment was deemed appropriate.

This case does not present the specter of long and complex litigation that might otherwise be avoided through a decision by this Court. *See Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963) (involving liquidation of national banks and over 143 parties). This is a straightforward criminal case against one individual and his corporation.

In sum, Raffield seeks review of a non-final order that does not meet the exceptions to the finality requirement of 28 U.S.C. § 1257. If he is acquitted, the issues are moot; if not, he can seek review by this Court from the highest state court from which relief can be had. The facts of his case are unique, involving temporary (emergency) federal rules with

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3 The emergency rules were extended only through December 22, 1986. *See* 51 Fed. Reg., 34219 (Sept. 26, 1986) ("Drum Fishery of the Gulf of Mexico; Extension of Effective Date of Interim Rule").

4 *See* 50 CFR § 653.3 ("Relation to Other Laws") (October 1, 1989 ed.).

a savings clause since abandoned. Factually, there is no lingering federal question that will survive outcome of the state proceedings. In the interim, Raffield is not restrained from exercising any constitutional rights, fundamental or not, by the presence of the challenged statute. Since both the challenged statute and the federal emergency rules seek to protect redfish, there will be no erosion of federal policy if this court declines review at this time. *See Flynt v. Ohio, supra* at 622 (no erosion of federal policy by allowing Ohio to prosecute under its obscenity statute). Raffield seeks federal intervention in a misdemeanor prosecution against a single individual (himself) and his corporation. This Court should not exercise jurisdiction.

PREEMPTION

Assuming this court has jurisdiction, the central fact is that the possession component of § 370.08(3) is a "possession or landing law" under the savings clause and preamble in the emergency rules. The Florida Supreme Court expressly found such. *See Raffield v. State,* 565 So.2d 704, 705 (Fla. 1990). ("The statute at issue today manifestly is a 'State law which prohibits the landing or possession' of red drum caught with a purse seine.")

The savings clause of the emergency rules, in effect when Raffield was arrested, declares:

> These regulations will not be construed to supersede any State law which prohibits the landing or *possession* within the jurisdiction of that State of any red drum. [e.s.]

See 51 Fed. Reg., 23554 (June 30, 1986). The preamble to the emergency rules defines what would be considered a non-superseded landing law:

Relation to State Laws

> The Secretary [of Commerce] recognizes the conservation and management efforts of the coastal states in the Gulf of Mexico with regard to the red drum fishery. The Secretary desires to support those efforts through this emergency action to the maximum extent permitted under the Magnuson Act. It is the intent of the Secretary to supplement the States' efforts to conserve red drum. Therefore, the emergency rule does not supersede any State landing laws which apply to red drum. For purposes of the emergency rule, *a State landing law is a statute, regulation or ordinance which makes it unlawful to land or possess within the jurisdiction of a State any red drum.* [e.s.]

See the preamble to the emergency rules, at 51 Fed. Reg. 23553 (June 30, 1986).

FLA.STAT. § 370.08(3) (1985) clearly bans possession, in Florida, of saltwater food fish caught with purse seines. Redfish (i.e., red drum) are specifically declared to be [saltwater] "food fish" by FLA.STAT. § 370.01(12) (1985):

> (12) "Food fish" shall include... *redfish,* ... and all other fish generally used for human consumption. [e.s.]

No reasonable reading of § 370.01(12) and § 370.08(3) together can avoid the conclusion that Raffield was arrested under a non-superseded "State landing law."

Nevertheless, Raffield contends that § 370.08(3) is preempted by federal laws and regulations. A close examination of the law of pre-emption shows that the statute is not preempted. As set forth above, the emergency regulations had a specific savings clause preserving the State's landing

laws and, furthermore, the state statute would not affect the taking of the federally-imposed quota.

The Supremacy Clause prohibits states from interfering with or obstructing federal law. *Hines v. Davidowitz,* 312 U.S. 52, 57 (1940). There is, however, a presumption against preemption. *Maryland v. Louisiana,* 451 U.S. 752, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.")

Three species of pre-emption occur. First, a federal statute may explicitly express an intent to pre-empt state regulation. *Shaw v. Delta Airlines,* 463 U.S. 85, 95-96 (1983). A statute may also explicitly disavow that intent. The Magnuson Act explicitly addresses the matter of pre-emption of state laws in § 306 [16 U.S.C. § 1856], entitled "State Jurisdiction." Section 306(a)(1) explicitly confirms state jurisdiction over activities by any person in its territorial waters. Although states are barred from regulating "directly or indirectly" vessels operating outside their territorial waters, that bar does not apply to "fishing vessel(s) registered under the law of that state." § 306(a)(3). The power of states to regulate within their territorial waters and to regulate their state-registered vessels in federal waters is not pre-empted by the Magnuson Act.

Even if the Act on its face did not bar pre-emption of state fishing laws that are within its powers to enact, judicial precedents explaining the pre-emption doctrine confirm the validity of the state statute *sub judice.* If the federal statute does not confirm or disavow an intent to pre-empt state law, courts may infer the second type of pre-emption; that is, an intent to pre-empt when the federal government has

regulated so comprehensively as to "occupy the field."[5] *E.g.*, *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 713-14 (1984); *Florida Avocado Growers v. Paul*, 373 U.S. 132, 135 (1963).

There can be no doubt as to whether Magnuson Act fishery regulations "occupy the field": section 306(a)(3) of the Act explicitly disavows this suggestion. It confirms the right of states to regulate the activities of state-registered fishing vessels, even when they operate outside the states' territorial waters.[6] By express language of the Magnuson Act, Congress has determined not to "occupy the field" of fisheries regulation. Since the Department of Commerce, when

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5 Raffield's assertion that Congress intended to vest *exclusive* regulation of the fisheries resources in the United States is not borne out by the language of the Act or the legislative history. The Act preserves states' *Skiriotis* jurisdiction over state registered vessels [306(a)(3)]. The report of the Senate Committee on Commerce states:

> Within the Fishery conservation zone, the United States would exercise exclusive fishery management authority. This authority is exclusive in the sense that no other nation may regulate fishing within the zone[.]
>
> * * * *
>
> [I]t preserves the domestic breakdown of management authority between the states and federal Government which has prevailed since the founding of the republic.

See Committee on Commerce and National Ocean Policy Study, 94th Cong., 2d Sess., *A Legislative History of the Fishery Conservation and Management Act of 1976*, at pages 677-78.

6 Raffield asserts that this exception allows regulation by the states only as to "matters touching on the health, safety or welfare of the persons participating in the commercial fishing industry." [pet. at 14] This assertion has no support in the language of the Act or its history. There is no need for an exception for that type of state regulation in the Magnuson Act, because under no conceivable interpretation of the Act could it be construed to preempt such regulation. This is exclusively a fishery management law. All of its parts must be construed as related to that subject, including the state registered vessel exception.

implementing the Magnuson Act, has only the powers delegated by the Congress, it may not adopt regulations that "occupy the field" of fisheries regulation. *See Louisiana Public Service Commission v. Federal Communications Commission,* 476 U.S. 355, 369-75 (statutory limits on jurisdiction barred federal preemption, through rulemaking, of state law, since a "federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority" [*id.* at 374]). To do so would be to exceed the Department's delegated authority by overruling a statutory confirmation of state regulatory powers.

In addition, the emergency rules specifically state:

> these regulations will not be construed to supersede any state law which prohibits the landing or *possession* within the jurisdiction of that state of any red drum. [e.s.]

51 Fed.Reg., 23554 (June 30, 1986). The challenged statute was applied on land and in Florida. It was not preempted.

The third species of pre-emption bars state regulation that is repugnant to federal regulations. *Florida Avocado Growers,* 373 U.S. at 142-43. If it is physically impossible to comply with both the state and federal regulations, the state scheme must yield. This Court, in *Florida Avocado Growers,* offered the following example of physical impossibility:

> if the federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the State any avocado measuring less than 8% oil content.

Id. at 143.[7] Raffield misconstrues this principle to argue that when a vessel has caught redfish with a purse seine under a federal permit, compliance with the state possession restriction is physically impossible. It is possible to comply with both the federal quota and Florida's possession/landing law by using other gear or landing and selling the fish in another state.

The pre-emption analysis does not end with the determination that compliance with both regulations is physically possible. State regulations may be preempted if they frustrate the purposes of the federal regulations. *Fidelity Federal Savings and Loan Assn. v. de la Cuesta,* 458 U.S. 141, 153 (1982). The purpose of the federal quota is to preserve the breeding stock of the fishery by preventing overfishing. Obviously, landing and possession limits do not obstruct or frustrate that purpose. Indeed, the federal regulations specifically preserve state landing and possession laws.

The essence of Raffield's argument is that the federal regulation confers a federal right to catch redfish using purse seines and that the state landing rules are an impediment to the free exercise of that right. However, this Court has continuously indicated that unless the state regulation is preempted under the principles described above, states are free to impose more stringent regulations. *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 719 (1985).

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7 The actual situation in *Florida Avocado Growers* arose because the federal rules governing avocado harvest in Florida were based on size and dates of harvest. Avocados certified under the federal rule were prevented from entering California where the code required avocados to contain at least 8% oil. The Supreme Court held that the Florida growers could leave their crops on the trees a little longer to achieve the required 8% for shipment to California and therefore it was not physically impossible to comply with both regulations. 373 U.S. at 143.

The holding of the Florida Supreme Court on preemption is correct on its facts and does not conflict with this Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), or the Rhode Island Supreme Court's decision in *State v. Sterling*, 448 A.2d 785 (R.I. 1982). Applying the *Jones* test for preemption, the challenged statute does not conflict with the federal regulation, especially in light of the savings clause. Similarly, there is no conflict with *Sterling*. There, the Rhode Island Supreme Court held there was a conflict between the federal rule and the state regulation, thereby requiring preemption. That court did *not* require preemption of state regulations by the mere existence of a fishery management plan. The Florida court properly found no conflict and no preemption.

PRIVILEGES AND IMMUNITIES

Raffield asserts his "right to fish" has been abridged by the state in violation of the Privileges and Immunities Clause. That clause was:

> designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.
>
> [and to] remov[e] from the citizens of each State the disabilities of alienage in the other States, and [to] giv[e] them equality of privilege with the citizens of those States[.]

Toomer v. Witsell, 334 U.S. 385, 395-96 (1947). In *Toomer*, a South Carolina statute was declared in violation of this

provision because it operated "to exclude non-residents and thereby create a commercial monopoly for South Carolina residents." *Id.* at 395.[8]

The statute at issue here creates no such disability. There is no discrimination against non-residents in favor of residents. Florida and non-Florida residents are subject to the law, when in possession of saltwater food fish caught with a purse seine. Conversely, any fisherman could have landed and possessed redfish, if not caught in a purse seine, in Florida.

This case presents no conflict with any precedents of this Court. It is consistent with the analysis of the privileges and immunities clause in *Toomer.* This case is also consistent with the holding in *Golden State Transit Co. v. Los Angeles,* 110 S.Ct. 444 (1989), where this Court outlined the test for determining whether an enforceable right is created by a federal statute.

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8 Raffield asserts that this Court in *Toomer* found a right to fish, which assertion forms the basis for most of the arguments set forth in his petition. The right recognized in *Toomer* was not a general right to fish free from government intrusion, but rather to do business free from the discrimination which the privileges and immunities clause was designed to prevent. Petitioner's argument that there is an unbridled right to fish would prevent regulation by the Magnuson Act or any state laws. No such right existed at common law. The Magnuson Act creates no such right. *See North Pacific Fishing Vessels Owners' Assoc. v. Sheffield,* 852 F.2d 572 (9th Cir. 1988)(table) [Note: This affirmance is followed by an unpublished opinion, which held, in an attorney's fee claim under 42 U.S.C. § 1988, that the Magnuson Act creates no right under 42 U.S.C. § 1983. *See* App. A herein.]

EQUAL PROTECTION

Raffield complains that the Florida statute denies him equal protection of the laws under the Fourteenth Amendment of the United States Constitution. This argument ignores the holding in *Skiriotis v. Florida,* 319 U.S. 69 (1940). There, this Court addressed the equal protection question raised by a Florida statute restricting the types of gear which Florida sponge fishermen could use in Florida waters or on the high seas:

> Nor is there any repugnance in the provisions of the statute to the equal protection clause of the Fourteenth Amendment. The statute applies equally to all persons within the jurisdiction of the state.

Id. at 75.[9]

Florida has a rational basis for enforcing its statute. The *Skiriotis* Court, and many afterwards, have recognized that a state's interest in preserving nearby fisheries is sufficiently strong to permit extraterritorial enforcement of its laws enacted for that purpose. *E.g. Felton v. Hodges,* 374 F.2d 337, 339 (5th Cir. 1967). *See United States v. Alaska,* 422 U.S. 184, 198-99 (1975) (recognizing "the special interest that a coastal state has in the preservation of the living resources in the high seas adjacent to its territorial sea"). Landing and possession limits are a rational way for the state to advance those interests. The Florida Supreme Court's holding as to equal protection does not present a conflict or a substantial question of federal law. It is squarely in line with this Court's decision in *Skiriotis.*

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9 In *Skiriotis,* this Court also recognized the power of the States to regulate the activities of their citizens on the high seas as long as there is no conflict with acts of Congress. 313 U.S. at 77.

COMMERCE CLAUSE

Raffield asserts that FLA. STAT. § 370.08(3), is an impermissible burden on interstate commerce. The proper analysis of this question is found in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), where this Court held:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

The first question then is whether there is a legitimate local interest advanced by the local regulations. Preservation of nearby fisheries has long been recognized as a legitimate local interest. *See Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 426 (1935) (fish taken from within and without the jurisdiction of a state are indistinguishable, therefore a state law restricting manufacture of fish flour from sardines brought into the state properly effectuates the policy of the law by rendering evasion more difficult).

Having established that there is a legitimate local interest, the next question is whether the law creates a direct or indirect burden on interstate commerce. If there is any such burden resulting from this statute, it is clear that it is indirect. Preservation of the redfish breeding population is the main purpose of the law; it is not directed at impairing interstate commerce. The only burden imposed by the law is a possibility that a Florida fisherman may have to land and sell his catch in another state. In fact, Raffield did land his fish in Louisiana. Rather than selling them there, he chose to transport them to Florida in knowing violation of the challenged statute.

The burden placed on interstate commerce by FLA.STAT. § 370.08(3) is not "excessive." It is insufficient to outweigh the benefits and legitimate state objectives so as to render the statute unconstitutional. *Bayside Fish,* 297 U.S. at 425-26 (effect of statute purely incidental, indirect, and not beyond purposes of legislation).

Finally, when fish are caught and landed, they "come to rest" in the state of Florida and are subject to legitimate state regulation. As did the cotton in *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. 17 (1933), the redfish here came to rest in Florida. Also, the redfish had no ascertainable destination outside Florida before shipping orders were given. As in *McLean:*

> Property thus withdrawn from transportation, *whether intrastate or interstate,* until restored to a transportation movement interstate, has often been held subject to local [regulation]. [e.s.] *Id.* at 21.

Florida's enforcement of § 370.08(3) against Raffield was valid because the redfish came to rest, and were thereby removed from interstate commerce.

DUE PROCESS

Raffield's substantive due process claim was not raised below and should not be considered at this time by this Court. *See Shelley v. Kraemer,* 334 U.S. 1, 8-9 (1947) (noting that in the predecessor action the court correctly declined to reach a constitutional issue not raised below). As set forth above, the Florida statute works no unconstitutional discrimination and is not arbitrary. Also as set forth above, the law is a reasonable way for the State to effectuate the legitimate goal of preserving fisheries resources. *See Bayside Fish* and *U.S. v. Alaska, supra.* This claim presents no substantial federal question and is without merit.

CONCLUSION

This Court is without jurisdiction for want of a final judgment under 28 U.S.C. § 1257. Raffield fails to raise a substantial federal question requiring review by this Court. The decision of the Florida Supreme Court does not conflict with any decision by this Court or any other State Supreme Court on an issue of federal law. Raffield's petition for certiorari must be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1990

EUGENE RAFFIELD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX

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North Pacific Fishing Vessel Owners' Association, et al.,

Plaintiffs-Appellants,

v.

Bill Sheffield, Governor, State of Alaska, et al.,

Defendants-Appellees.

No. 87-3646

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted June 8, 1988.
Decided July 7, 1988.

D. Alaska

AFFIRMED.

[Respondent's Note: The following is excerpted from the unpublished part of the opinion.]

Appeal from the United States District Court for the District of Alaska; James M. Fitzgerald, District Judge, Presiding.

Before EUGENE A WRIGHT, FERGUSON and BRUNETTI, Circuit Judges.

The North Pacific Fishing Vessel Owners' Association (NPFVOA) and two individual named plaintiffs (collectively hereinafter "appellants") appeal the district court's denial of their motion for attorney's fees under 42 U.S.C. § 1988. Appellants claim that the district court erred in ruling that they were not entitled to attorney's fees because they had not made a cognizable claim under 42 U.S.C. § 1983. Appellants argue that they made a valid statutory claim under

the Magnuson Fishery Conservation and Management Act (Magnuson Act), as well as valid constitutional claims under the Supremacy Clause, the Commerce Clause, the Due Process and Equal Protection clauses of the Fourteenth Amendment, and under the Privileges and Immunities Clause of Article IV, section 2, and that any one of these provided a basis for a section 1983 claim.

I.

In 1978, the Secretary of Commerce, acting under the authority of the Magnuson Act (16 U.S.C. §§ 1801-1882), promulgated regulations which restricted vessels operating in Alaska's various geographic fishing areas delineated in the Act. These areas, or "Fishing Control Zones" ("FCZs"), encompassed the oceanic expanse from the Alaska's territorial boundary of three miles to a line 200 miles offshore. The relevant regulations defined certain areas to be non-exclusive. *See* 50 C.F.R. §§ 671.23, 671.24 (suspended 51 Fed.Reg. 40,027, 40,029 (1986), repealed 52 Fed.Reg. 17,577, 17,579 (1987)).

In March of 1983, the state of Alaska's Board of Fisheries adopted regulations for the 1984 Tanner crab season which designated as "super-exclusive" the same FCZS referenced in the federal regulations. Under these state regulations, anyone registered to take Tanner crab in the super-exclusive areas would not be permitted to fish or take crab in any other area. Violation of these regulations could result in potential seizure of the vessel and arrest. In addition, the state regulations placed restrictions on the number of crab pots that each vessel could use while operating in a separate area defined as the Kodiak District.

Shortly after the state adopted these regulations, the North Pacific Fishery Management Council, an advisory council to the Secretary of Commerce, considered whether the federal government should adopt the state restrictions at issue. The Council ultimately rejected the idea in September of 1983 in part because the Council found that, while unable to make a "quantitative estimate," they believed that the proposed regulations could have a disparate impact between "local" and "non-local" vessels.[1]

Just prior to the scheduled February 10 opening of the Tanner crab season, the governor's office issued a press release which stated that these new regulations would be specifically enforced. Shortly thereafter, appellants filed a complaint seeking declaratory and injunctive relief against enforcement of the state regulations. On February 9, the district court granted a temporary restraining order. That same day, the Alaska Board of Fisheries repealed the challenged regulations.

Appellants subsequently filed for attorney's fees. At a hearing on the motion, counsel for the state raised the possibility that the state might try to reenact the challenged regulations. Since such action would require appellants to go to trial on the merits of their claims—and thus possibly increase their attorney's fees—the court reserved its decision on appellants' motion for fees.

The parties later stipulated to a dismissal of the action, conditioned upon the state's agreement not to implement similar regulations in the future. Appellants then filed a supplemental motion for attorney's fees. On June 21, 1985 the district court issued an order dismissing the case,

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1 The Council defined local vessels to be "all boats whose home port was Chignik, Sand Point or King Cove, owned by a local resident who fishes predominantly in this area."

"subject to plaintiffs' motion and supplemental motion for an award of attorney's fees, costs, and expenses, both parties having reserved the right to appeal said disposition."

The district court's original dismissal order was premised exclusively on appellants' preemption claim. None of the other constitutional claims were mentioned. On January 21, 1987, after supplemental responses had been made by both parties, the district court issued an order denying the appellants' motion for attorney's fees. The court stated that, while appellants had "prevailed on the merits," they had failed to state any cognizable section 1983 claim. The court also stated that it had relied primarily on the Supremacy Clause challenge in granting the temporary restraining order, and neither that claim nor any of appellants' other claims sufficiently supported a request for attorney's fees under section 1988.

* * * *

[II] A.

Appellants claim that they have a cause of action to enforce the Magnuson Act under section 1983 which entitles them to collect attorney's fees under section 1988. We disagree.

In *Maine v. Thiboutot,* 448 U.S. 1 (1980), the Supreme Court held that individuals may have a section 1983 cause of action against state officials for violations of federal statutes. However, two exceptions to this presumption that a section 1983 remedy exists were recently summarized by the Court as follows:

> where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983.

Wright v. City of Roanoke Redevelopment & Housing Authority, [479 U.S. 418, 423] 107 S.Ct. 766, 770 (1987).

Regarding the first exception, this court has stated that where a statute's enforcement scheme is sufficiently comprehensive, an intent to foreclose private enforcement can be inferred. *Almond Hill School v. United States Department of Agriculture*, 768 F.2d 1030, 1035 (9th Cir. 1985).

The Magnuson Act provides various enforcement mechanisms, and remedies including civil fines, civil forfeiture, and criminal penalties. 16 U.S.C. §§ 1858-1860. Enforcement responsibility for the Act has been entrusted to the Secretary of Commerce and "the Secretary of the department in which the Coast Guard is operating," and their delegatees. 16 U.S.C. § 1861(a). Section 1856(b) is especially relevant to the instant case in that it addresses circumstances in which state regulation lies in direct conflict with the federal regulatory scheme. The section provides that the Secretary of Commerce may exercise preemptive powers over a state fishing regulation, inter alia, where the state action "will substantially and adversely affect the carrying out of [the federal] fishery management plan...." 16 U.S.C. § 1856(b)(1)(B).

We hold that by enacting this comprehensive remedial scheme, Congress intended to foreclose private enforcement of the Act through section 1983.

Even if we did not find that appellants' cause of action was barred by the Act's comprehensive remedial scheme, however, appellants would still be barred by the second exception to the presumption of section 1983 availability because the Magnuson Act does not create enforceable rights in favor of appellants. Appellants contend that the Magnuson Act gives them a "right to fish." To have a federal right cognizable under section 1983, appellants must be members of the class for whose particular benefit the Magnuson Act was

enacted. *See Boatowners and Tenants Association v. Port of Seattle,* 716 F.2d 669, 672 (9th Cir. 1983) (reiterating the *Cort v. Ash,* 422 U.S. 66 (1975), analysis for implying private rights of action from statutes). "The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *California v. Sierra Club,* 451 U.S. 287, 294 (1981). While appellants are beneficiaries of the Act because of the Act's restrictions on foreign fleets, we find nothing in the statute which demonstrates that Congress intended to confer federal rights on them. *Cf. Boatowner,* 716 F.2d at 673 ("There is no indication that the statute was intended to benefit specially the pleasure craft owners ... nor that Congress intended to confer federal rights on [them]."). Rather, the Act was passed to protect the domestic fisheries from depletion. *See Washington State Charterboat Association v. Baldridge,* 702 F.2d 820, 823-4 (9th Cir. 1983), *cert. denied,* 464 U.S. 1053 (1984), and therefore does not confer rights upon appellants.[2]

Having concluded that the statutory enforcement provisions are exhaustive and that the Magnuson Act does not confer "enforceable rights" upon appellants, it is clear that the district court did not err in concluding that appellants do not have a section 1983 claim under this theory.

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2 Appellants claim that Congress' intent to create a privately enforceable right through the Magnuson Act is demonstrated in the Act's requirement that federal regulations "not discriminate between residents of different states," 16 U.S.C. 1851(a)(4), and through the Act's introduction, articulating the Congressional policy that implementation of the Act be responsive to the needs of U.S. citizens and not unnecessarily impede legitimate uses of the high seas. 16 U.S.C. 1801(c)(2)-(3). Viewed in context, those sections confer neither substantive rights, nor an enforcement right.